No. 2978

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHARPLES SEPARATOR COMPANY
(a corporation),
Plaintiff in Error,

vs.

W. W. SKINNER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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PERNAU-WALSH PRINTING CO.

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Learned counsel for plaintiff in error have been industrious in combing the testimony for statements favorable to their client and have displayed dexterity and ingenuity in arranging the same in a light which shows off their side to the best possible advantage. This can always be done with seeming success in any case where the evidence has been conflicting, and we respectfully submit that this is all there is to the points made under the head of the insufficiency of the evidence.

We will not therefore undertake to follow counsel's general statement of the case in which they review the evidence from their own point of view,

but will proceed to answer the specific points which they endeavor to make.

I.

ANSWERING THE CONTENTION THAT THE EVIDENCE SHOWS THAT THE DAMAGE TO SKINNER'S COWS WAS CAUSED BY AN UNSANITARY CONDITION AND NOT BY THE MECHANICAL MILKER, WE SUBMIT AS FOLLOWS:

The defendant having expressly pleaded, as an affirmative defense, the unsanitary condition of Skinner's Dairy, it was to be expected that defendant's witnesses would establish the existence of such condition, if it were possible to be done. Yet only two of defendant's witnesses, Reed and Taylor, touched on this point. Albert J. Reed was employed by the Sharples Separator Company as their mechanical milker expert. His deposition was taken on behalf of that company, but by some inexplainable error it appears in the transcript as having been taken on behalf of "plaintiff." The mere reading of the deposition—the questions asked on direct examination and the questions asked on cross examination, as well as the various objections made—should be sufficient to convince anyone that the deposition was not taken for plaintiff. The transcript moreover shows (239) that the cross examination was conducted by "Mr. Swing," who is attorney of record for the plaintiff, Mr. Skinner. It is therefore to be expected that defendant's attorney conducted the direct examination,

and the fact is that Mr. Willard P. Smith, one of the attorneys of record for the defendant, The Sharples Separator Company, did conduct the direct examination. With this reminder, we do not anticipate that counsel for the other side will persist in seeking an advantage based upon a mistake or repeat the insinuation contained in their brief that this "deposition was taken for Mr. Skinner, *but with great discrimination not offered by him upon the trial.*" (brief p. 10).

Mr. Reed, who as expert for the defendant company, installed the milker in the Skinner Dairy and instructed them in its use and who himself made several different attempts to operate it, describes the dairy as follows:

> "There was a dairy shed. It had a thatched roof, two rows of stanchions, two rows of mangers, two concrete platforms for the cows to stand on, and one concrete gutter on the south side; the gutter on the north side was without a concrete bottom; there was a wooden floor through the center. He had a milk house and power house combined, about 50 feet south of this dairy shed. The milking machines and the dairy shed connected up to the power house and operated from the power house. There was a water hole located between the power house and dairy shed; it is similar to all water holes in Imperial Valley for washing up dairy utensils;—the dairy shed was kept in as good cleanliness as it was possible to keep; it was clean all but the gutter on the north side, and that, having no bottom, was more or less dirty. It could be cleaned out, but not as clean as it should be. Later on I made suggestions to Mr. Skinner by which he could remedy the trou-

ble; I put in two board planks, 2x12, and filled in the bottom" (Tr. pp. 234, 235).

Dr. Walter J. Taylor, defendant's other witness who referred to the sanitary condition of the Skinner ranch in his testimony, said that he "noted that they were on a par with the majority of dairies in the Imperial Valley" (179).

The foregoing certainly does not constitute a very formidable indictment of the Skinner Dairy nor does it support defendant's allegations that the dairy was unsanitary.

Mindful of the admonition given by opposing counsel that plaintiff would "not be human if he did not represent conditions in the light most favorable to himself" (brief p. 143). We will leave it to others to describe the actual conditions surrounding his dairy.

Mr. C. F. Boarts, who had handled milch cows practically all his life and who was at the Skinner ranch the latter part of February, very shortly after the installation of the mechanical milker and who looked around the Skinner place and noted the conditions (259), testified:

"He had a very good dairy house; his dairy barn had a cement floor all the way through; I believe there was one side that had a gutter that was not finished. He had his pools fenced at that time and the general condition as to cleanliness in the barn was good. There was no loose manure in the gutters and the cleanliness of the place struck me as being very good. The water supply was not out to this pool,

but was close by, and the water looked good in the pool'' (259).

H. D. Nye was State Dairy Inspector for Imperial County from August 28, 1914, until June 1, 1916, and as such, inspected dairies as to their sanitary condition. He visited the Skinner Dairy about five times between September 1, 1914, and the end of that year. He testified:

> ''The sanitary condition of that dairy was good. I never found a mud hole in that dairy —I mean in the corrals or around the buildings. The barn was clean; the milk house was in good shape; the water holes where the cows drank, the settling basins, as we call them, were fenced, and planked, so the cows could drink out of them without getting into them, and the water was as clear as we have ever been able to get water in Imperial Valley. I have never seen any stock or foreign matter in the ponds of any description. The utensils, both the milking machine and other utensils I saw there, were always clean and sweet smelling. The cows once in a while would be a little muddy around the lower part of the legs, but aside from that, were in very good condition'' (263).

H. Rogers, another witness, had been State Dairy Inspector and County Health Officer for four years preceding the appointment of Mr. Nye. He had visited the Skinner Dairy as often as two or three times a week. He confirmed the testimony of Mr. Nye to the effect that the sanitary conditions on the Skinner Dairy were good (265).

It is not likely that two State officials would give the Skinner Dairy a good character unless the conditions warranted it.

However, if there were conditions existing at the Skinner dairy at the time and after the installation of the milking machine which interfered with the successful operation of the milker, it was the duty of the defendant company and its experts to so advise the plaintiff. Their expert installed the milker and he and other representatives of the defendant company were frequently at the dairy thereafter, but nowhere in the record is there any evidence that any of them suggested any change in the conditions which existed after the milker was installed except in the single instance where Reed suggested planking the north gutter (165). This suggestion was promptly carried into effect.

On this point Skinner testified:

> "At the time Mr. Reed installed my machine and instructed me in the operation of it, he did not suggest any changes to be made in the sanitary conditions which surrounded my dairy. We installed the machine before I got the barn really finished and we did not get one of the gutters as good as it should be and after using it for a while the cows began to break it and Mr. Reed said, 'Mr. Skinner, if you will just take 2x12s it will fill the gutter and we can clean it out.'' He did not suggest any other changes in the conditions there. I operated the machine under the same conditions under which he operated it. He did not wash the teat cups in any different water from what I washed them—I mean water from any different source. I simply followed out what he showed me'' (164, 165).

Hard pressed for some explanation of the condition of Skinner's cows the defendant grasps at

first one theory then another in the vain hope, no doubt, that while each if examined by itself would be found insufficient, yet taken all together they may present a seeming strength, which no one of them possesses in fact.

Great stress is laid upon the water supply at the Skinner Dairy. A Dr. Taylor found "yellow micrococcus" in some water test he made in Imperial Valley. However no tests were made of water on the Skinner Dairy (180). Taylor also found yellow micrococcus in the milk drawn from Skinner's sick cows. From this it is argued that since all water came from the Colorado River and yellow micrococcus were found in some of the water: there must have been yellow micrococcus on the water on the Skinner Dairy; that since yellow micrococcus were found in the cow's milk it must have gotten there when the cows went to drink or was transmitted through the teat cups by their having been washed in the water; that since the cows examined and which were found to have yellow micrococcus in their milk were sick, therefore their sickness was caused by the presence of the yellow micrococcus. Tests were made with milk only from cows suffering from udder trouble (177 and 178). Non constat, but that yellow micrococcus might have been found in the milk of the healthy cows, too. (Dr. Ward of the University of California seems to have published an article in which he states that he had examined sixteen healthy udders

and had found this yellow micrococcus present in every case, 221. Same effect see Dr. Hart, 201.)

Dr. Taylor found the same micrococcus in the water from the El Centro Hotel tap, the Date Canal and the filtered water from the Duniway Drug Store (181); in other words in the very water all the inhabitants of the city of El Centro were drinking. There is no particular significance in this discovery because these germs are generally found everywhere; they are ubiquitous, omnipresent (Kelly 216, Hart 200). There is not in the evidence any suggestion of there having been any general epidemic of infectious mammitis either among the people or live stock who drank this water. It was only at Skinner's Dairy and there *only on the cows that were milked with defendant's milker* (130). Even if there were yellow micrococcus in Skinner's water (for which there is no evidence), they never got to the cows from washing the milking utensils in the water because the water used for this purpose was boiled water (Reed 239, Skinner 157). This was an extra precaution that Skinner voluntarily took. The company's instructions nowhere required the water to be boiled or the teat cup to be scalded (Hart 207). It only required that they be put in a solution of lime. Skinner did that too (149).

Another theory advanced by the company is that the injuries resulted from "improper use or mismanagement" of the milker (brief 182), most of the milking having been done by Allen and Skin-

ner's son characterized on page 20 of the company's brief as "inexperienced boys." These same "boys" are referred to on page 4 of the company's brief as a "young man named Allen who was about the same age as Mr. Skinner's son—22 or 23 years old." But aside from the competency of Skinner's milkers what about the failure of Reed, the company's own expert, to make the machine work from January 25 to July 7, and from October 20 to December 20, when he had absolute control? The company vouches for Reed's qualifications as an operator, yet he was unsuccessful.

Mr. Reed, who was the company's milking machine expert, and whose duty it was not only to install machines but also to "instruct the purchasers of the same in their proper use" (Frank, 253), did instruct Skinner's milkers in the use of the machine (145); he stayed until he was satisfied they could operate it (118); he stayed two weeks and at the time he left declared they were "perfectly capable of running it" (170). Counsel for the other side attack plaintiff for keeping pressure at 7 and vacuum at 17 while milking, yet it is undisputed that this was the emphatic instruction of the company (147-148). Defendant's own witness says so (Van Denenden 226). The pulsator was to be used in making the change from an easy milker to a hard milker, not the pressure or vacuum (226). This was done according to instructions (169) Skinner says "I followed the instructions carefully, every word; I studied it like a school book" (148).

Reed came back three times afterwards to check up their work but instructed no changes in the way they were operating the milker (166); in fact he said "they were operating the machine all right" (170).

So on close scrutiny falls each of defendant's theories as fall they must because the real cause of the injury was the milking machine. There had been no trouble of this kind before the mechanical milker was used on the cows (122, 168). No cows were affected at the time the milker was installed (Reed 236). Reed said "Skinner, you have the cleanest herd I ever put a machine on" (151). Then the cows began developing the swollen quarters—"hard" quarters (171). However as soon as they quit milking the cows with the machine and began milking by hand the swelling reduced and the cows began to get better (164-171). In fact they would return to normal except they wouldn't give as much milk as before (166, 168). But when the milker was put back on them the swelling would reappear (167). During the period from July to October, 1914, when the machine was not being used on the cows, no new cases of swollen quarters developed (172). After the milker was restarted by Reed October 15, 1914, on one string of 30 cows (Reed 249) several new cases of swollen quarters developed in that string (Reed 250). While during the same time no new cases developed among the other two strings being milked by hand (Mrs. Skinner 173). And finally after the use of the machine

was abandoned in December, 1914, no further trouble of that kind developed (135-168).

There can be no rational explanation of the swollen quarters other than that the operation of the machine either bruised or irritated the teats or that the suction drew the blood down into the teats causing congestion and inflammation, which in turn caused the swollen hard quarters.

If it was germs in the manure in the corral which the cows picked up when they lay down in it, then some of the cows would have picked up some of the germs prior to the time of the installation of the milker, but there was no trouble of that kind in the herd until after the introduction of the milker. If Skinner's cows were picking up contagious or infectious germs in the "dirty" corral between February and July, 1914, when some twenty cows on whom the milking machine was working developed swollen quarters and again six or seven more on whom the milker was being used between October 20 and December 20, 1914, what were the same infectious or contagious germs doing between July 1 and October 15, when the milker was not being used and no new cases of swollen quarters developed. It will not be contended that the germs were hibernating. Again during the two months from October 20 to December 20, 1914, when the machine was used on only one string of cows (129, 167, 249) and the remaining two strings were being milked by hand, the only cases of swollen quarters to appear developed among the thirty

being milked by the machine (173). It will not be contended that these germs had a sense of discrimination and picked out and attacked only the cows on which defendant's milker was being used.

If it were the germs in the mud holes in which defendant says the cows had to wade to drink, all the cows waded there—those milked by hand as well as those milked by the machine—they also waded before the machine was installed, when no new cases developed—again we ask why the difference?

Or if it was due to the water in which the utensils were washed, the milkers who milked by hand washed their hands in the same water and defendant's witnesses say the germs can be transmitted by hand as easily as by the teat cup (Kelly 218, Dr. Hart 202). What is the explanation that only the cows milked by the milker developed swollen teats?

If they attempt to say the injuries were due to the improper use of the machine what can they say of the results attained by their own expert? Reed was at the Skinner Dairy from June 25 to July 7. Regarding the occasion for his being there, he says: "Skinner had stopped his machine and I was sent for to restart it" (245). "I was sent by the Sharples Separator Company." The machine was operated under Reed's direction (Reed 246). Reed took charge of the machine and ran it for two weeks (Skinner 121). No one attempted to exercise supervision over him; he took charge; he put the machine on all the cows and ran it

about two weeks (Mrs. Skinner 171). During these two weeks Reed injured—ruined for dairy purposes, some twenty cows (124). Reed himself admits the injurious effect of the milker on the cows after he started the machine and states he had to keep taking cows off the machine on account of their condition (248). He described the condition to be:

"The whole udder was swollen, there was high fever—individual cows were in very bad condition." He was asked then: "How soon did this condition appear after you had started the milker upon them?" To which he made the short but significant reply: "Directly" (249). Prior to Reed taking charge on June 25 none of the cows had sustained permanent injury (120). Of those injured by Reed, Mrs. Skinner said, "seventeen did not give any milk at all—they were too bad" (171). "Three of the cows actually died" (124).

But if the foregoing test be not admitted as conclusive, it remained for the company itself to furnish the final evidence which absolutely completes the case against it.

One day in October, 1914, F. L. Briggs, a high priced employee of the Sharples Separator Company (132) called at the dairy and importuned Skinner to consent to a further testing of the machine on Skinner's cows (122 and 123). When Reed left July 7 the milking machine stopped and it was not again used by Skinner (122, 128, 167). He had enough of its workings. He was convinced,

but not so the company. It wanted to start the machine again. Skinner absolutely refused to expose his cows to further injury from the machine. But Briggs would not take "no" for an answer. He came back again (123) and over the bitter protest of Mrs. Skinner (172) and finally only after Briggs had given Skinner a written agreement, the machine was restarted.

This October test was made under conditions most favorable to the success of the company's machine. They selected their own expert operator to run the machine. Skinner told Briggs at the time the agreement was made "you can send anybody you want. It is up to your people, the Sharples Separator Company" (132). Briggs wanted Reed (132). Reed says he was at the Skinner place October 20 to December 20, and took charge of the mechanical milker (246). "I was working at that time for the Sharples Separator Company" (247). Skinner told Briggs and Reed "to pick the herd and get just such cows as they wanted"; "I had nothing to do with selecting the cows," says Skinner (129). "They selected a string of good cows. They were mostly young cows that had not been used on the milking machine before" (Mrs. Skinner 173). "They selected cows that had not been injured" (129). *"They picked cows they thought the machine would milk"* (129). Briggs and Reed then cleaned up the machine, it having been in disuse from July 7 to October 20 (122). "They took the things out and boiled them and put

in new rubbers" (129). "Briggs helped Reed to sterilize everything and get it milking" (173). "Briggs stayed there after the first milking and I think he came back a time or two after that" (Aubrey Skinner 167). These two representatives of the defendant were given full authority to make their test in their own way under conditions of their own choosing. If the company's own experts failed under these most favorable circumstances, what defense is possible? Mr. Skinner said: "Mr. Reed had absolute control" (129-130). Mr. Reed did all the using; he did everything to it; I never touched it and none of my men—I gave my men strict instructions not to touch the machine under any conditions" (128-129). Mr. Reed himself says: "I took charge of the mechanical milker" (246). "I operated the milker" (246).

Now what were the results obtained. Swollen quarters began appearing within the first two weeks of the operation of the milker (Reed 249-250). Out of the thirty cows Reed was milking (249) more than seven were injured, some absolutely ruined for dairy purposes (Skinner 130-Aubrey Skinner 167). And finally Reed, himself, was compelled to admit that he could not operate the machine without injuring Skinner's cows (133-134, 173), and advised his company to abandon the attempt (134).

The history of the operation of this milker shows conclusively that the direct and proximate result of its use was the swollen quarters. Reed admits

he observed this result "directly" after he started the milker upon the cows (249). Mrs. Skinner noticed a change in the cows after the milker was put on them—saw swollen quarters develop (171). Skinner says:

> "Throughout the year 1914, at least one-half of my herd were affected—at least fifty from the use of the machine" (144).

How weak and impotent the company's answer when called to account for this injury and destruction of property: *Skinner was unable to point out "specifically or particularly any defect in the milker".*

How can the company in good faith make this contention when they had their own expert there for that very purpose and he didn't know (158). What obligation was Skinner under to find and point out specifically and particularly any defect in the milker. The company manufactured it; they put it on the market; they warranted it would do certain work; it failed; is not that enough? Skinner did not pose as an inventor. He did not undertake to perfect their machine. They represented it to be perfect. If it was not, it was their business to discover the "specific and particular" defect and remedy the same.

And in fact this is what it seems the company was really attempting to do. Experimenting with their machine on Skinner's cows and *at Skinner's expense.* The company's experts were trying out

their machine on Skinner's cows and the company's subsequent and present attitude has been and is that they had everything to gain and nothing to lose by such a course. Skinner was to be left without recourse for his losses.

In view of the foregoing facts, is it any wonder that Dr. Taylor, defendant's expert witness, whose qualifications cover a page of the transcript (176), after examining the udders of Skinner's sick cows by "manual" manipulation to determine the presence of congestion or other pathological condition (177) and after making a microscopic examination of samples of the milk from the cows (178), and after making "cultures on Agar plates," and also "sub-cultures upon slant Agar medium," and after transferring colonies "on Agar slant mediums in test tubes by the streak method of inoculation" declared to defendant's attorney that Skinner's cows "were not suffering from infectious mammitis" (187), and further that it was his opinion *"that the condition started from an external injury"* (189). And this is the identical conclusion reached by the only other veterinarian who saw Skinner's cows and who testified in the case, except that Dr. Cram dropped the camouflage and came out with the clean-cut statement:

> "I decided that the primary cause of the condition of the cows I saw there was due to the *milking machine"* (275)

If, still additional evidence were required it is in record.

We quote Dr. Ridder, Deputy County Veterinarian for Imperial County. He said:

> "I have come in contact with quite a number of the Sharples Separator Mechanical Milkers in various parts of my community—probably 8 or 10. They were not successful on account of the irritation—the constant suction producing irritation on the udder; it hurts the cow's teats; it sets up an inflammation—mammitis" (267).

C. F. Boarts said:

> "In my opinion the Sharples Separator machine was not a successful machine; the machines under my observation have failed to milk the cows without injury" (260).

A. G. McCulloch, who had used a Sharples milker and had seen others in operation, testified: "the effect I noticed on cows following the use of the Sharples mechanical milker was udder trouble" (283). It was his opinion that the milker could not be used without injuring the cows (284). To all this must be added the depositions of J. H. Eastman, J. W. Finley, H. C. King, J. J. Miller and H. O. Woods, that they had used the milker according to company instructions and had been unable to operate it without injuring their cows (290).

In view of the foregoing we feel warranted in saying not only that there is some evidence to support the verdict (which is sufficient where the evidence is conflicting), but that the preponderance of the evidence is overwhelmingly in favor of the

plaintiff's contention that the milking machine was the cause of the injury to his cows.

II.

ANSWERING THE CONTENTION THAT THE AMOUNT OF DAMAGES ALLOWED WAS NOT JUSTIFIED BY THE EVIDENCE.

No point is made that the evidence does not support the item of $2005 for injury to the cows, and the item $420 for pasture.

The first item of damages which defendant attacks is $1007 for purchase and installation of the mechanical milker. Now, if the company's warranty was broken (and we claim the evidence demonstrates this fact), plaintiff was entitled under the law of California to the excess of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value, plus a fair compensation for the loss incurred in an effort in good faith to use it for the purpose for which it was warranted (Calif. Civil Code, 3313 and 3314). Skinner's uncontradicted testimony on this point is:

> "The reasonable value of this milking machine is the condition in which it was found to be by me after I bought it, is that it was worth nothing; if it had been the way it was represented by the company it would have been worth $1000" (129).

This $1000 of course, represents the milking machine installed with the necessary equipment and capable of milking the cows without injury as the

company warranted. This testimony supports the allegations of the complaint and there is no evidence contradicting it; in fact all the evidence on this point tends to confirm it.

The first part of this item, to wit: $461.42 cash paid defendant company for the machine itself, stands conceded as proven. Nor is it denied that plaintiff, in his effort in good faith to install and use the machine for milking his cows, actually paid out the further sums of $175 for an engine to operate the milker and $370 for lumber, cement, lime and nails to build stanchions and put in a concrete floor necessary for the installation and operation of the milking machine. Defendant contends, that, notwithstanding this money was expended wholly and solely for the purpose of being able to operate the milker, still, inasmuch as plaintiff still has them and no allowance whatever should be made in the judgment for their cost. First as to the gasoline engine—certainly plaintiff would not have made this expenditure but for the milking machine. Skinner says:

> "I bought it to run this machine with. I do not consider that it is worth anything to me to run the separator with, because I have to pay my men the same to separate it by hand. I could not dispose of it. I suppose it is of some value" (140).

Defendant's witness, Briggs, without ever seeing the engine, fixes its value in December, 1914, at 50% of its cost (231).

With reference to the $370 for lumber, cement, lime and nails—this is another expenditure attributable directly and solely to Skinner's effort to use the milker—"They told me that I would have to build stanchions before they could install the machine" (143). Except for the milker these stanchions had no value; in fact when milking by hand they constitute a hinderance, placing the milker in such close proximity to the cows, shutting off the air and breeze.

> "In the spring, summer and fall, it is so hot, you get in there, the men will not work—unless you have got an extraordinarily cool place, they object to it—you can build what we call California shingles—build a shed and the cows walk under that, and most men prefer that to a barn of any kind, because it is cooler and there are very few people that have those stanchions" (143).

In other words, in Imperial Valley where they have no rain, shade is all that is needed. The cement floor was necessary only because of the stanchions holding the cows in one place so long. But for the stanchions the cows would walk around in the open yard where the sunshine and dry air would go a long way towards taking care of the droppings.

> "In the Imperial Valley, the sunshine through one day's time will dry nearly anything, and it will be just as dry as it can be in a day's time" (158).

The question, then, of plaintiff's loss from expenditures made to install and operate defendant's

machine being an open question of fact and having been submitted to the jury under a proper instruction of the court, it will be presumed that they followed the instruction and fixed a proven value upon the equipment left on Skinner's place after the abandonment of the milking machine. Any amount so determined upon by the jury which was substantially less than the initial cost would find support in the evidence and be upheld on appeal.

With reference to plaintiff's claim for loss of butter fat, one thing that was clearly proven beyond peradventure was that the direct and proximate result of the use of the milking machine upon Skinner's cows was a shrinking in the amount of milk the cows gave.

First all cows that were milked by the milker gave less milk than when milked by hand, even though they were not injured (126).

Then there were a great many cows that developed swollen quarters but whose injuries were not permanent. These, while they seemed to return to normal under treatment, yet they never gave as much milk as before receiving the injury (161, 166, 168). There were about thirty in this class prior to June 25 (124, 151, 171). Altogether there were about fifty injured in this way at one time or another (144).

Then there were some twenty cows that were absolutely ruined for dairy purposes (124-151). These had been injured between June 25 and July

7 when Reed, the defendant's expert operator, ran the machine, because Skinner says they were injured before Briggs came (124) and the machine had not been used since July 7; also no cows had been injured up to July 25 (120). These cows developed swollen bags to the extent that they were not worth anything for dairy purposes; "the bags were ruined; the milk would not come through the bags" (121). "There were some that gave a substance, I don't know whether you would call it milk or not, you would not take the milk from them to use" (171). McCulloch noticed that the effect of the mechanical milker was to dry up the cows (283). Six Imperial Valley Dairymen gave their depositions that the use of the defendant's mechanical milker resulted in shortage in the milk (290). Even Reed, defendant's own operator, admitted that the use of the milker on Skinner's herd resulted in their giving less milk (250). "It is a fact that some of Skinner's cows, after the inflammation had set up in their udders, quit giving milk altogether" (Reed 251). With the loss in milk generally admitted by all the witnesses the only question was how great was the loss. Mr. Skinner estimated it at $1500.00. He was qualified to make the estimate. He had had this dairy about five years. He knew his cows. He had watched their individual performances in order to cut out the poor milkers and build up an extra good herd (111). He took the milk to the creamery and knew what the herd in the aggregate

should do under normal circumstances; he received the daily cream sheets and so kept track of the amount of butter fat his herd was producing and the price at which it was selling. Mr. Skinner had the requisite general knowledge to enable him to make an accurate estimate, and weight should be given to it.

Of course it would have been more satisfactory if plaintiff had kept an individual record for each cow in his herd. But defendant ought not now to take advantage of plaintiff's condition which results from his relying on defendant's representation and warranties and not foreseeing that he would be compelled to sue defendant company in order to secure redress. Because the exact amount of the damage is difficult of ascertainment is no reason for denying any and all relief whatever, where it is clearly proven that damages were actually suffered.

But the damage on this point is not left to conjecture as learned counsel on the other side think. Mr. Skinner very correctly says at page 138:

> "There are two or three different ways of arriving at the damage of $1500 for loss of butter fat. In June, my cows were averaging better than $6 apiece for the butter fat. There were 20 of those cows knocked out the last of June or the first of July. You multiply the number of cows that were out of the herd by the average; those cows that were injured were over average cows. That is the way that I arrived at the amount of butter fat I lost each month. You take the average

> of the herd and you multiply that then by the number of months between the time these cows went out and I brought this suit".

Twenty cows at $6 each per month for twelve months (the suit was started July 6, 1915) would amount to $1440. But it is only fair to notice that the price of butter fat in June was only 26 cents, while every month but two in the remainder of that year it was higher, reaching 31 cents in October, 34½ cents in November and 30 cents in December (293). In this connection also, observe that "cows give more at some seasons of the year than others". In Imperial Valley as a rule the months of October, November and December are the best months of the year (139).

Furthermore the $1440 loss of butter fat arrived at in this way does not include the shortage, testified to, in the other 30 of the 50 cows injured by the milker (144). These were injured in one or more quarters and while they seemed to return to normal never gave as much milk afterwards (161, 166, 168). Nor does it include the shrinkage in the remaining fifty cows who were not visibly injured (126).

So it seems to us that there is sufficient evidence to support an item of damage for at least $1440, for loss in butter fat due directly to the operation of defendant's milker on plaintiff's cows.

This, then, would leave the case as far as the items of damage go, as follows:

Loss caused by injuries to the cows (conceded)		$2005.00
Loss caused by pasture (conceded)		420.00
Loss by butter fat proven		1440.00
Loss by purchase and installation of milker		
Cash paid for milking machine (conceded)	$461.42	
Loss on gasoline engine 50% of cost value as fixed by defendant's witness after milker was abandoned	87.50	
Loss on lumber, cement, etc. depreciation 50% of cost, same basis as fixed for engine	185.00	733.92
Total damages		$4598.92

We submit that the jury in returning verdict of $3763.92 were well within the evidence.

III.

ANSWERING CONTENTION THAT THE EVIDENCE FAILED TO ESTABLISH THAT THE DAMAGE WAS CAUSED BY THE SHARPLES THREE UNITS AS DISTINGUISHED FROM THE SO-CALLED EDGAR UNIT.

First, there is evidence sufficient to support the theory that Edgar Bros. acted only as sales agents

for Sharples Separator Company in selling plaintiff the fourth unit. Before the trial the plaintiff contended that Edgar Bros. were necessary parties defendant on the theory that they had sold plaintiff the fourth unit and therefore were liable for any damage caused by it. On this theory we named them parties defendant and filed our suit in the state courts. Thereupon defendant company filed a petition for removal to the United States courts on the ground that Edgar Bros. Company was not a necessary or proper party defendant, and F. A. Frank, managing agent for defendant Sharples Separator Company, made affidavit in said petition that Edgar Bros. Company was paid a commission for the sale of said machine to plaintiff and "was acting at all times herein simply and solely as agent for your petitioner" (17). The state court thereupon transferred the case to the Federal court and plaintiff's motion to remand was denied. The case coming on for trial Edgar Bros. Company's motion for a nonsuit, on the ground that they had acted merely in the capacity of a sales agent, was granted.

Hickson was the salesman for Sharples Separator Company who sold plaintiff the milker (111). Hickson had Edgar Bros. Company's man with him at the time (174). Skinner says that Hickson told him, "any time I want another unit I could either get it through them or notify Mr. Edgar and they would get the unit for me" (174). "I went to Mr. Edgar and he ordered the fourth

unit for me. I just told Mr. Edgar to order the fourth unit for me and he did" (174).

The Sharples expert operator, Reed, returned to Skinner's ranch to try and fix up the milker at Edgar Bros. instigation (121). When Briggs, another agent of Sharples Company, came to Imperial Valley in October to get Skinner to permit further tests on his cows, he took Skinner to Edgar Bros. to get the agreement fixed up (123). When Reed failed in his last attempt and quit in December the first place he went was to Edgar Bros. to talk to Mr. Edgar (133). Skinner offered to return the milker to Mr. Edgar (134). In fact, the evidence, all through the record, shows that Edgar Bros. Company was acting for the Sharples Company. Skinner says, "I would notify Mr. Edgar and he would pass the communications to Sharples people" (162). "I would make my complaints to Edgar Bros. when Reed and Briggs was not there and they said they would notify the company" (162). Without multiplying quotations from the record we are satisfied to say that there was evidence to warrant the jury in finding that Edgar Bros. Company acted in a representative capacity only when it ordered and delivered the fourth unit to Skinner.

Secondly, it is immaterial whether or not the fourth unit was covered by the express warranty stated in the contract of sale. The Sharples Company manufactured the fourth unit; they manufactured it for the purpose of having it used in con-

junction with other like units for milking cows; they put it on the market to be sold for the purpose of being used to milk cows; they thereby impliedly warranted that it could be safely used for that purpose. The unit was ordered from defendant company for use by Skinner. They had consented in advance that an additional unit might be used on the milker; it was to their financial advantage to have Skinner buy the fourth unit; it made no difference to them whether the fourth unit was delivered to Skinner through parcel post, or by express, or through Edgar Bros. Company, or by their own salesmen. They told Skinner as much (174). Skinner only followed the company's instructions when he purchased through Edgar Bros.; the Sharples Company is as much liable for the effects of the fourth unit as it is for the other three units. Their implied warranty was the same as their expressed guarantee. They knew of its being used and made no objection. In fact, their own expert himself, in June and April, used it for milking Skinner's cows. The four units were absolutely identical (231); it was impossible to tell one from the other (136). There is nothing in the suggestion that the trouble was caused by using four units instead of three.

Thirdly—and this is the controlling point regarding the fourth unit, it is immaterial who sold Skinner the fourth unit because the injury was done while the company's man was operating it. It would be the same even if the fourth unit was of

an entirely different make. The company's man went to the Skinner Dairy, under the company's instructions, and in the course of his employment took charge of all four units and operated them from June 25 to July 7 and also probably used the fourth unit from October 20 to December 20, 1914. The company, therefore, is absolutely liable for all the ordinary and natural consequences of the act of its agent done in the course of his employment.

No one disputes that Reed was working for the Sharples Company and under its direction when he took charge of the milker and operated it on Skinner's cows from June 25 to July 7; Reed says so himself (245-246). F. A. Frank, "sales-manager of the San Francisco office" for Sharples Company, and under whom Reed was working, admits that he sent Reed to Skinner's place between June 20 and July 6. "*Reed was to do anything that was necessary to straighten things out*" (255). Reed says: "I restarted the machine. It was operated under my direction" (246). And this period, June 25 to July 7, is when practically all the damage to Skinner's cows occurred (120, 121). "No one there attempted to exercise supervision over him; he took charge; he put the machine on all the cows and ran it about two weeks" (171).

Reed came back again in October and again ran the milker from October 20th to December 20th, 1914. Witness Frank undertakes to deny that Reed was in the company's employ during this period, but the evidence is the other way. The

company was anxious to get the milking machine going again at the Skinner Dairy after it had been stopped July 7, 1914. If they could get this machine running satisfactorily "a lot more business there", where dairying is one of the principal industries (258). The company therefore sent Briggs to the Skinner ranch to "find out what was wrong and straighten out the trouble" (Frank 253, 256). The first thing Briggs wanted to do was to restart the machine. Skinner refused (123); he had suffered injury enough; any curiosity he may have had regarding the operation of the machine was more than satisfied. He feared the evil results of any further use of the milker; his wife was protesting bitterly (172). The company's man, however, persisted. The company could not expect to get "a lot more business down there" after the disastrous results of Reed's previous attempt in June and July. It was important to the company to offset the unfavorable effect produced by their previous effort. Hence Briggs refused to take "no" for an answer. Finally, to satisfy Skinner, Briggs, acting for the Sharples Separator Company, gave him a written agreement. Even then Skinner was not satisfied, "I desired a witness", he says (123). "But for my receiving the written paper, I would not have allowed Reed to restart the machine" (Skinner 123). And Skinner further explains how Reed came to be selected to operate the machine: "Mr. Briggs asked me, when he wanted to send a man, if I had any pref-

erence as to whom he sent. I told him I did not; I said 'You will do'. He said 'I can't do it, I am too high priced a man * * * how will Reed do?' I said, 'Reed will do all right, you can send anybody you want. It is up to your people, the Sharples Separator Company" (132). This same Briggs was called as a witness for defendant company and he did not contradict any of Skinner's statements (231-232). Frank, while denying that Reed was then working for the company, admits that he, the sales-manager for the company, did send Reed down to the Skinner place (256). Admits that the company paid his railroad fare (257). Admits that Reed reported to him, the sales-manager (258, 256). Admits that Reed's letters were placed in the company's regular files (256). Admits that the company was financially interested in the outcome of Reed's efforts (258), but still attempts to avoid the responsibility when Reed failed. On this point, however, Frank is directly contradicted by Reed himself. Reed testified:

> "I started to work for them (Sharples Separator Company) on the first of June, 1913, and continued to work for them until January 15, 1915" (240).

This covers the period in dispute. But Reed touches on this point specifically:

> "Q. When next were you there?
> "A. October 20 to December 20.
> "Q. What was the occasion of your being there at that time?
> "A. To take charge of the mechanical milker. I was working at that time for the

> Sharples Separator Company. While there on the Skinner ranch at that time I operated the milker'' (246-247).

The foregoing certainly constitutes sufficient basis for the evident conclusion of the jury that Reed was acting for the defendant company during the time he operated the milker.

Regarding this October to December test Skinner says:

> "Mr. Reed did all the using; he did everything; I never touched it, and none of my men. I gave my men strict instructions not to touch the machine under any circumstances'' (128-129). "Mr. Reed had absolute control of it; I had nothing to do with it at all'' (129-130).

In view of this state of the evidence—the uncontradicted testimony that the cows had suffered no permanent injury prior to June 25 (120) and that Reed was in charge of the milker at all times it was operated thereafter (122)—the jury was warranted under the instruction of the court (299) in holding the defendant company liable for all injuries inflicted on Skinner's cows by the milker while being operated by an agent or employee of the company—and this without regard to who sold Skinner the fourth unit.

IV.

ANSWERING THE CONTENTION THAT THE EVIDENCE FAILS TO SHOW THE BREACH OF ANY WARRANTY.

The Sharples Separator Company sold plaintiff the milker in question under the following warranty:

> "The company further guarantees this machine to be in all respects as represented in its printed matter, and to be capable of doing the work as claimed therein".

Defendant's counsel have advanced the contention that plaintiff cannot recover because "no printed matter was attached to the contract or made a part of the contract in any recognizable manner or identified in any way by the contract itself" (Brief 178).

We do not believe this argument does justice to the defendant company. Until we are convinced otherwise, we are going to presume that the company worded its guarantee with an honest intent and purpose. We believe the guarantee was intended to mean something. We believe it was intended to mean what the words imply. We refuse to believe that the guarantee was artfully worded so as to prove a trap for the unwary. We refuse to believe that any respectable concern would descend to trickery and chicanery in its advertising or in its contract. But if it did, no court of justice would countenance its scheme; no court would approve a construction of a contract which would open the door to fraud and deceit and enable an unscrupulous and designing person to impose with impunity upon a fellow being.

No, the guarantee means exactly what is says. The company proposes to stand squarely back of every word it says regarding its own product. Very

properly the company limits its liability to its "printed" representations. This is not an uncommon qualification owing to the well known difficulties in controlling the oral representations of zealous salesmen intent on earning large commissions. But aside from this one limitation and restriction, the company clearly guarantees that it will stand back of the representations contained in *all* its printed matter. The inclusion of one restriction is the exclusion of all others. With this rational and honorable interpretation of the contract, the element of indefiniteness and uncertainty is gone.

Of course there is this further limitation which underlies all warranties, namely, that it should have been relied upon and induced the purchase. Defendant contends that there is a lack of evidence on this point. The following is the evidence:

> "The negotiations (regarding the mechanical milker) were opened by one Mr. Hickson, on behalf of the Sharples Separator Company people. Up to that time I did not know anything about the Sharples Separator Company or about any mechanical milker. Their sales agent delivered to me certain printed literature published by the Sharples Separator Company, *which I read and believed and acted upon;* I bought a milking machine" (Skinner 111-112).

The various pieces of printed literature of the Sharples Separator Company which their agent delivered to Skinner during the negotiations, for the evident purpose of inducing him to buy their

milker, and which Skinner testified he read, believed and acted upon, were subsequently separately and specifically identified and admitted into evidence as plaintiff's exhibits 2, 3 and 4. Defendant cannot now object to plaintiff's identification of this printed matter merely because he said

> "this pamphlet or *one like it* was given to me by the agent of the Sharples Separator Company during the negotiations for the sale of their machine".

This is a sufficiently definite identification as there were doubtless many thousand pamphlets of the same issue, which were exactly identical and it would have been impossible for plaintiff to have distinguished the one given him from another of the same issue. The important thing was, not that the exact pamphlet should be identified, but that the printed representations of the company should be identified. We submit that this was done.

Anyway, no objection was made at the trial to the introduction of the printed matter on the ground that it had not been sufficiently identified; nor did anyone on behalf of the defendant company deny that plaintiff's exhibits 2, 3 and 4 were printed matter published by defendant company and by its agent delivered to Skinner as testified to by him.

In the printed matter offered and received in evidence as plaintiff's exhibits 2, 3 and 4 were distinct representations or warranties that the milker would not injure the cow.

"It gently massages the cows teats, keeping the teats and udders of the most delicate and hardiest cow in a soft, cool *natural,* perfect condition, *free from congestion*" (115).

"The Sharples Mechanical Milker * * * *not only absolutely prevents all irritation of teats and udders but actually benefits the cows*" (116).

"The high grade cow is much safer when milked by the Sharples Milker than when milked by hired help and *just as safe as when milked by the owner himself*" (117).

The printed literature also represented that the use of the milker would not lessen the amount of milk received from the cows.

"The gentle massage of the teat cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production" (115).

"The Sharples Mechanical Milker * * * improves the flow of milk" (116).

"*There is not the least tendency to dry up the cows prematurely* nor have any other harmful effect" (118).

Now the evidence which we reviewed in answer to defendant's first contention, and which is not necessary to repeat here, clearly and conclusively shows that both these representations or warranties were breached; that the direct effect of the use of the milker on Skinner's cows was to seriously and permanently injure many of them, and lessened the amount of milk received from them.

Defendant's next point is that the foregoing quotations from its printed matter constitute "representations" and therefore they are not "warran-

ties." But a statement may be both a representation and a warranty. The fact that it is an "antecedent statement" does not preclude it from also becoming a warranty under a contract subsequently made. The "antecedent statement" may be incorporated as a warranty in the contract either *in haec verba* or by appropriate reference. The latter is what was done in this case.

Defendant also argues that the quotations from the printed matter relative to its milker are not warranties because they amount to nothing more than "dealers talk", "descriptive recital", "exaggerated statements", etc. This contention marks the wide divergence between the "before" and the "after" talk. At the time this printed matter was given to Skinner the defendant company wanted him to believe every word. The company then told him: "These statements merit special consideration; they are conservative" (115). Now their counsel refer to the same representations as mere "dealers talk" and "exaggerated statements." But the quotations go far beyond "dealers talk" or "simple commendation."

When the company said the operation of their milker keeps the cows' teats and udders in a "natural, perfect condition, free from congestion," they went beyond mere talk and made a statement of fact regarding something they claimed to know.

When the defendant said its milker not only *absolutely prevents all irritation of teats and ud-*

ders, but actually benefits the cows, they made a representation of *fact* and not of *opinion.*

When the company said there is not the least tendency to dry up the cows prematurely, *nor have any other harmful effect,* it made something more than an "exaggerated statement"—it made an unqualified statement of fact which was essentially untrue.

When defendant company further added: "These statements merit special consideration; they are conservative" (115), it solemnly bound itself to make good the full import of its representations.

In view of these representations how can defendant now say it was mere "puffing" or that it was simply indulging in "dealers talk?" It would stultify its own conscience if it now were to dismiss these representations with the remark that they were "exaggerated statements", which Skinner ought to have known better than to have believed, when they at the time told him they were *conservative.* These, like all the other representations, were not said orally, in the excitement of a sale transaction, but were deliberately written out, and put into cold type. Skinner had a right to believe them and act upon them, which he did when he purchased one of their milkers. He operated it according to the company's instructions and according to the conditions of the sale. The conditions of sale merely epitomize the contents of the book of instructions. We have already shown in the beginning of our brief that these were complied with. Defendant's

contention that the conditions of sale were not observed, is without force, first because untrue, and secondly because all the damage was done while their own expert operator was running the machine. And this covers the point also that the warranties referred only to the time of the sale. However, there is no evidence anywhere in the record that the mechanical condition of the machine changed at any time subsequent to its installation. The presumption is that there was no change. It was the duty of the company's experts to see that the dairymen using their milking machines kept them in good order (118). The company's experts were at Skinner's ranch repeatedly, yet none of them suggested any change in the machine. The dirt referred to as having gotten into the machine was simply the result of its three month's disuse. There is no evidence that it was ever operated in a dirty condition.

In conclusion, we can only add that all the arguments attacking the sufficiency of the evidence merely present cases of conflicting evidence, and the findings of the jury in each instance are binding and conclusive on appeal.

V.

ANSWERING THE CONTENTION THAT ERROR WAS COMMITTED IN ADMITTING PRINTED MATTER.

Our answer to this contention has already been given in answering the preceding point. The warranty found in the contract of sale is broad enough

in its terms to include all the company's *printed* representations regarding its milking machine. The particular printed matter on which plaintiff relied was sufficiently identified by him, particularly in view of the absence of any objection on this point at the trial.

A general objection that certain proffered exhibits are "incompetent, irrelevant and immaterial" is insufficient to cover a want of identification.

People v. Louie Foo, 112 Calif. 17, 21, 22.

The representations, we submit, go beyond "the expression of hopes, expectations and beliefs." They amount to representations of fact. They warrant that their machine would do certain specified things and that it would not do certain other things. If it is true as contended for by defendant, that a statement as to what a machine would do in the future is not a warranty—then we have restricted warranties to a very narrow class.

VI.

ANSWERING THE CONTENTION THAT ERROR WAS COMMITTED IN ADMITTING INCOMPETENT CONCLUSIONS OF WITNESSES.

Under this head complaint is made of a number of the rulings of the court. We will consider them *seriatim*.

1. Counsel contend that error is disclosed in the following record:

"Mr. Skinner. They were to send this demonstrator there once a month to go through my herd and see if everything was working all right.

"Mr. Park. We move to strike out the last statement of the witness as to the duties on the part of the Sharples Separator Company.

"Said motion to strike out was then and there denied" (120).

The question which preceded and called for the testimony given by Mr. Skinner is not set out in the record nor is any objection to that question shown.

"An objection cannot be taken for the first time by a motion to strike out."

People v. Nelson, 85 Cal. 421;

People v. Samario, 84 Cal. 484.

The motion to strike should have stated the specific grounds of the motion. The fact is it stated none whatever. Having failed to direct the court's attention to the feature claimed to have been objectionable, counsel will not now be heard to complain that the court did not of its own initiative perceive that the answer was objectionable on some ground.

"The party must lay his finger on the point of the objection to the admission or exclusion of evidence."

Martin v. Travers, 12 Cal. 243.

"When an objection is made, the trial court and opposing counsel are entitled to know the ground on which it is based so that the court may make its ruling understandingly."

3 C. J. 746.

The rule that objections to questions must state the grounds thereof applies with equal force to objections to answers.

> "A motion to strike out must show the reason therefor."
>
> 3 C. J. 833;
>
> Katahdin Pulp Co. v. Peltomoa, 156 Fed. 342.

The foregoing is a fair example of many of defendant's points of alleged errors; the record when examined fails to furnish a proper legal basis for any complaint on appeal.

All that Skinner meant by this statement was that he had been told that the company would do this. This is the ordinary meaning of the language.

Skinner was warranted in making the statement. It is evident that he was not attempting to pass judgment on their legal liability. This was substantially what the company had told Skinner they would do. In one of their printed pamphlets delivered to Skinner at the time he bought the milker the following appears:

> "We keep enough experts out on the territory to see that all dairymen do keep their machines in good order" (118).

Briggs and Reed were both milking machine experts (252, 253). Munson was another one (283). The duties of these experts were

> "to look after milking machines and troubles which customers occasionally have and see that that particular line of work was carried on properly" (252).

For example, Frank says Reed was at Skinner's place about a dozen times during the year (242) looking after his machine. All of which gives a reasonable basis for Skinner's statement.

2. Counsel object because Skinner was allowed to state that he had suffered a loss of milk as the result of the operation of the milker and that he estimated his loss at $1500.

Certainly it was proper for Skinner to be asked and for him to testify that he observed the effect of the use of the milker upon his cows and that the effect he noted was that the cows gave less milk. If twenty cows were so badly injured by that milker that they gave no more milk it was proper to ask Skinner a question calling for that fact.

Certainly it would have been proper for Skinner to have testified that he got less milk while milking his cows with the machine than when milking them by hand.

The loss of milk was an issue in the case and it was perfectly reasonable and proper to ask him if there was a loss and if so what amount.

Skinner was qualified to estimate the loss. He was the owner of the dairy. He had owned it for about five years (111). He watched the individual performances of his cows because he kept cutting out the poor milkers and building up his herd (111). He had milked his cows by hand and he also operated the milker (146, 147). He sold his

milk to the creamery and received the daily cream sheet showing amount of butter fat and the price at which it sold (137-178). He observed the effect of the use of the milker. He saw some twenty of his cows so badly injured by the milking machine in June, 1914, that they gave no more milk, and who better than Skinner was qualified to give testimony on this point? He possessed the requisite knowledge to make the estimate that he gave.

The right of an owner to place a value on his property is well settled in law. He is presumed to know its value.

> See cases tabulated under this head in 17 Cyc. 114 and 115.

In Clarke v. S. F. etc. Ry. Co., 142 Cal. 614 at 616, the plaintiff was asked: "Q. What was the amount of the damage to the machine by fire on that day? A. Five hundred dollars".

The court said:

> "The objection urged is that the question called for the conclusion of the witness and not for facts. This may be true, but the character and extent of the injury was fully described by the witness and the defendant had ample opportunity to test the witness on cross-examination as to the basis of his estimate of the damages and did so. * * * Under these circumstances the defendant could not have been injured by the answer given to the question referred to".

What was said by the California court applies to this case.

As to Skinner's statement "if they had not used this milker the cows would have held up", no objection was made to the question which preceded it nor was there any motion to strike it out. Its presence in the case therefore is by mutual consent.

3. The ruling of the court leaving in Mr. Boart's statement (259) that Skinner had "a very good dairy house" is harmless error, if any at all, because the witness immediately proceeded to explain what he meant by that expression and gave the jury the facts on which he based the general statement, to wit, that it had a cement floor all the way through it; that there were gutters, although one was unfinished; that there was no loose manure in the gutters; that the place was clean (259).

Conclusions accompanied by statement of the facts upon which they are based are not prejudicial.

Dollar v. International Banking Corporation, (Cal. App.) 109 Pac. 499.

4. The matter which counsel says should have been stricken out of Dr. Cram's testimony, shows on its face to be harmless if not actually in favor of defendant. Witness' very frank statement, on which defendant bases his claim of error, to wit, that his opinion was a presumption only and that he had made no bacteriological or chemical analysis, removed all effect his former statement could have that this germ was not an infectious germ; it was not a contagious germ (275).

This entire subject matter which counsel claims should have been stricken out was brought out on

defendant's own cross-examination and the questions themselves not being in the record and the motion to strike not including the ground that the answers were not responsive to the questions, it will be presumed that they were responsive and that defendant called out by his own questions the subject matter which he afterwards sought to have stricken from the record.

5. With reference to Mr. McCulloch testifying as an expert we submit this is left largely to the discretion of the trial court. If defendant was dissatisfied with the showing of the witness' qualifications he could have asked leave to cross-examine on that point. This he did not do. The cross-examination may generally be relied upon to show witness' ignorance and neutralize the force of his opinions if an error has been committed by the court in admitting an incompetent person to testify. Unless the ruling of the court is palpably and grossly wrong it will not be reversed.

> Rogers on Expert Testimony, sec. 22, 23;
> Lawson on Expert Evidence, 276, 468;
> Gilbert on Indirect Evidence, sec. 209.

We claim witness made a sufficient *prima facie* showing. He testified that he had handled dairy cows all his life—with the exception of seven years; that he was pretty well acquainted with the common disease of cows and that he knew what mammitis is. We submit that this was sufficient (281). Further his general discussion, on cross-examination (287, 288) developed the fact that the

witness possessed technical knowledge regarding that which he was testifying to.

With reference to his knowledge of milking machines, it appears that he was familiar with the operation of three different kinds of milking machines, Sharples, Hinman and the B. L. K. (281). He had observed milking machines operated at other places (288) as well as in Imperial Valley (281). But not only had he seen the milking machine operated but he had himself operated one for about two months (281). Before commencing to operate the Sharples milker, witness had been instructed by a representative of defendant company as well as furnished with a book of instructions with which he familiarized himself (283). We submit in view of this foundation that the trial court did not err in permitting McCulloch to testify upon the subject of mechanical milkers.

Furthermore defendant will not be heard to complain of McCulloch's qualifications when it used five witnesses as experts who possessed even less qualifications (290).

The last objection against McCulloch's testimony to the effect that he was permitted to say that he had followed instructions, was harmless in view of the fact that the manner in which witness operated the milking machine was approved by the defendant's representative Munson. Munson said McCulloch's management and operation of the milker was absolutely perfect (283), which testimony was nowhere contradicted.

The objection to McCulloch's testimony that he "followed the instructions of the company" in operating the milker cannot be considered seriously in view of the fact that counsel for the defendant stipulated that certain other witnesses would testify to the same fact in the same language as appears at page 290, Tr.

City of Denver v. Teeter, 31 Colorado 486; 74 Pac. 459.

VII.

ANSWERING CONTENTION THAT ERROR WAS COMMITTED IN ADMITTING INTO EVIDENCE ACTS AND DECLARATIONS OF BRIGGS.

There is no question but that Briggs was *in fact* an agent of the Sharples Separator Company at the time in question. He was an expert operator. Reed, another expert operator, *admittedly under the instructions of defendant company,* had taken charge and ran the milker on Skinner's cows from June 25 to July 7. Reed was authorized, *"to do anything that was necessary to straighten things out"* (Frank 255). These are very large powers. Briggs was a higher priced man than Reed (132) and presumably of larger authority. There is evidence to support the contention that Briggs had authority to do what he did. Briggs was sent there "to see if he (Skinner) could not be satisfied." Frank told Briggs to "find out the trouble" (253).

> "I was interested in keeping Skinner satisfied, because I was hoping to get a lot more business down there" (Frank 258).

The use of the Skinner machine had been abandoned. Its last operation had been disastrous. It meant dollars in the pockets of the Sharples Separator Company to get the machine running again; to get Skinner satisfied and make some kind of a favorable showing before the dairymen of Imperial Valley. The company had to get the machine running again and it had to secure Skinner's consent before it could do that. Assuming that Briggs had no more authority than Reed, he had authority to do "anything necessary to straighten things out", and under the circumstances this necessarily included authority to secure Skinner's consent to the restarting of the machine, which could only be done by the giving of the written contract.

The agreement placed no additional liability upon the company which it did not already have either under the law or by reason of its guaranty. It is not unreasonable therefore to hold that Briggs was authorized to say his company would do that which in reality it was already obligated to do.

It is interesting to note that notwithstanding the company says that Briggs signed its name to a very important contract without its consent and without any authority to do so, still Mr. Briggs is retained in the employ of the company (252, 231).

The first complaint under this head is that the court erred in not granting defendant's motion to strike out Skinner's statement that Briggs wanted to start the machine again (122). But no grounds were specified in the motion, and therefore counsel

is not in a position to complain of the court's ruling. Furthermore the statement was purely preliminary leading up to the execution of the written agreement and it was a proper part of the foundation to be laid before offering that instrument itself. It is harmless inasmuch as the company itself admitted it wanted the machine started (256, 257, 258).

The next objection arose on the following state of the record:

> "The WITNESS. I finally agreed that if they would take charge of the machine on thirty cows——
>
> "Mr. PARKE. If the court please, we object to any agreements entered into by and between Skinner and Mr. Briggs" etc. (123).

Although the court overruled the objection it is absolutely harmless error at most. The witness never completed his answer and made no further effort to state the purport or contents of the written agreement, but confined himself to laying the preliminary foundation for the offering of the instrument (123). Defendant's objection therefore served its purpose and accomplished its end as fully as if it had been sustained by the court. No motion was made to strike out what the witnesses had stated prior to the objection.

Counsel's objection to Skinner's statement, "But for my receiving this written paper, I would not have allowed Reed to restart the machine", is without basis, as the statement was made without objec-

tion from defendant and no motion was made to strike it out.

The next complaint is based on the following state of the record:

> "The COURT. Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?
>
> "Mr. PARKE. I dislike to object to the court's question, but we object to the question as to the conditions under which he started the use of the machine" (129).

The circumstances under which the machine was restarted in October were material and relevant to the case. Skinner had asked and was entitled to recover those losses incurred by him in attempting in good faith to operate the machine. He had already made or allowed two unsuccessful trials of the machine. He therefore would not be permitted of his own volition to continue the operation of the machine for the purpose of piling up damages against the defendant. He had the right and it was his duty to show the circumstances under which he allowed the milker to restart after previous unsuccessful attempts, in support of his good faith in so doing.

Another complaint arose out of the overruling of an objection to a question propounded to Mr. Skinner relating to possible ratification of the Briggs contract by the company (131).

Assuming that the ruling was erroneous, defendant was in no wise injured by the answer given in

response to it. It was favorable to defendant. The question was:

> "I willl ask you if at any time since, you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?"

To which witness replied:

> "They did notify me" (131).

That is to say that the company did notify him that the Briggs contract was not a valid contract. It was impossible for defendant to have been injured by that answer.

Defendant's next complaint is found in the following record:

> "The COURT. Did they ever notify you that Briggs was not their agent and had no authority to do what he did?
>
> "Exception Number 13.
>
> "The WITNESS. No, sir.
>
> "Mr. PARKE. We move to strike out the answer of the witness.
>
> "Said motion to strike was then and there denied" (131).

We submit the record furnishes the defendant no legal basis for complaint as his motion to strike failed to specify any grounds whatever. Neither was there any objection to the question. The answer was responsive to the question and therefore the motion to strike had no apparent grounds to support it.

> "A party cannot wait to see what the answer of a witness will be and then move to strike it out if unfavorable to him."
>
> Hayne New Trial and Appeal, 502.

The next complaint arose on a state of the record revealed at page 171. Mrs. Skinner having testified that Briggs finally started the milker "under that written paper", she was asked:

> "Mr. Swing. Q. Was it started before or after that written paper was signed by Mr. Briggs."

Mr. Parke objected on the sole ground that, "there is no evidence of a written contract of any kind" (172). In other words his objection was that the question assumed a state of facts not in evidence. But the contrary is true. Mrs. Skinner had just finished referring to the written paper under which Briggs restarted the machine and Skinner himself had previously testified to the execution of the written contract (123). Therefore we submit that the objection stated was not well founded and was properly overruled.

Plaintiff laid the foundation and offered the written contract in order to show all the circumstances under which the milker was restarted in October and to show that it was not started at the instigation of plaintiff but that he was acting in good faith in permitting a further test. Therefore no error was committed in referring to the acts, declarations and contract under which Briggs restarted the machine.

But in our opinion the whole matter relating to the Briggs contract is settled adversely to appellant's contention by the company itself introducing

the contract into evidence at the close of the case (291, 293). Defendant at that time made plaintiff's entire bill of particulars a part of the evidence as defendant's exhibit No. 2. Neither the offer nor the order or admission in any wise limited the use or purpose of the exhibit. The bill and its contents went into the record and to the jury for all purposes. Defendant will not be heard to complain of plaintiff's evidence when by its own act it made the same subject matter a part of its evidence.

Reed v. New, 35 Kan. 727; 12 P. 139.

VIII.

NO ERROR WAS COMMITTED BY THE COURT IN ALLOWING THE TESTIMONY OF ALBERT J. REED TO GO IN, AND IF ERROR WAS COMMITTED, IT WAS HARMLESS.

1. As appears at page 212 of the Transcript, the statements of Reed were objected to on the ground that there was no evidence before the court to show that Reed was the agent of the Sharples Separator Company, and they were "incompetent, irrelevant and immaterial".

There was much evidence in the record showing that Reed was the agent of defendant company during the whole time the mechanical milker was operated, there being a conflict of testimony, merely, with regard to his agency after October 20, 1914. If the trial judge resolved this conflict in the plaintiff's favor, the objection was not well

taken, and was properly overruled. Reed testified at pages 246 and 247 of the Transcript that he was during that time working for Sharples Separator Company. His testimony is as competent as that of any other person on that point.

Montgomery v. Dorn, 25 Cal. App. 666.

Since Reed was the agent of defendant company, what he said was competent, relevant and material. Furthermore, "incompetent, irrelevant and immaterial" alone means nothing. The cases of Union Const. Co. v. W. U. Tel. Co., 163 Cal. 298, and Smith v. Liverpool Ins. Co., 107 Cal. 432, cited by counsel for plaintiff in error, go no further than to say that declarations are not admissible until agency is shown. In neither of those cases was the evidence so strong tending to prove agency, as in the present case, yet in the first case the Supreme Court held that the agency was sufficiently established.

Reed was to operate the milker and report to the company, which is sufficient to show his authority to write and send the telegram.

Counsel's argument to the effect that the company is not bound by the acts of Reed because he had quit, is a waste of words for the reason that counsel misunderstand or misinterpret the meaning of "quit". Reed "quit" milking only, as is shown by his language at pages 132 and 133 of the Transcript, and by the telegram at page 134.

2. If there was error in the admission of the statements of Reed and the telegram, the error was

waived by the defendant in permitting Mrs. Skinner to testify to the same matters without objection (Tr. p. 173).

City of Denver v. Teeter, 31 Colo. 486, 74 Pac. 459.

See also

3 Century Digest, par. 4165.

The most objectionable part of the telegram is the inference that the machine was injuring the cows. Mrs. Skinner at page 173 testified to his statements directly to this effect, without objection.

Reed's statements were made at the time he quit milking, and they were made about the milking, i. e., operating the mechanical milker. They were sufficient, therefore, to satisfy the rules of law as to time, and were concerning the very work he was doing for the company.

3. Defendant made no valid objection to the foundation laid for the introduction of the telegram, and cannot raise the point for the first time on appeal. The transcript, at the bottom of page 133, shows that defendant company furnished to counsel for plaintiff the original delivered copy of the telegram. Reed sent the telegram in the course of his employment, for Frank testified at page 258 that he "asked him to write me, keeping me advised of conditions". Reed did this by wire on this occasion. Since Reed was the defendant's agent at the time he sent the telegram, obviously, the rule contended for by counsel for defendant at page 227 of their brief—that the company must

acknowledge, ratify or act on the telegram in order to be bound—does not apply. That is the rule where a stranger is the author of the telegram, but not so when it is sent by an agent.

4. The telegram was a written report of an agent to his principal, in the course of his employment, and immediately after the injuries referred to therein. It is therefore admissible against the principal under the rule laid down in

La Abra Silver Min. Co. v. United States, 175 U. S. 423 at pages 498-9; 20 Sup. Ct. Rep. 168;

Lipscomb v. South Bend R. Co., 65 S. C. 148; 43 S. E. 388;

Lemen v. Kansas City Southern R. Co., 151 Mo. App. 511; 132 S. W. 13;

Hilbert v. Spokane International R. Co., 20 Idaho 54; 116 Pac. 1116;

Quanah A. & P. R. Co. v. Galloway, (Tex.) 154 S. W. 653.

According to these cases such a report comes within an exception to the hearsay rule.

IX.

THE COURT BELOW DID NOT ERR IN STRIKING FROM THE TESTIMONY OF MR. FRANK THE STATEMENT "AND I BELIEVE THAT REED NOTIFIED SKINNER TOO".

This part of the record appears at page 257 of the Transcript. The questions and answers are not in the record as such, but the statement, by its

form, shows that it was not responsive to any question, but that it was gratuitously added by the witness. Furthermore it is the baldest hearsay, and is only a belief, at that.

The rule that an objection must be specific, and that a motion to strike out must state the particular grounds, applies to cases where the evidence is admitted, and not where it is excluded. If an objection is not specific, but is nevertheless sustained, the party who made it may advance any ground which may exist to sustain the ruling. This doctrine springs from the rule that

> "a right decision will not be overturned merely because a wrong reason is given for it, provided a sufficient reason exists upon which it may rest; and upon that other rule which calls into action every possible intendment in support of the ruling of a court while holding him who would overthrow it strictly to the specific grounds upon which he has elected to rely."

Hayne New Trial and Appeal, Vol. I, pp. 522, 523;

Clarke v. Huber, 25 Cal. 593;

Davey v. S. P. Co., 116 Cal. 330, 331.

See also,

Hayne New Trial and Appeal, Vol. II, paragraphs 284 and 285.

X.

THE COURT COMMITTED NO ERROR IN EXCLUDING EVIDENCE OF THE OPERATION OF THE SHARPLES MECHANICAL MILKER IN WESTCHERSTER, PENNSYLVANIA, OR AT SAN LEANDRO, CALIFORNIA.

1. When Dr. George H. Hart, as appears at page 199 of the Transcript, undertook to testify as to how the Sharples Mechanical Milker worked at Westchester, Pennsylvania, the objection was made that "no foundation had been laid". The court sustained the objection.

It is obvious that the testimony does not show that the tests there were made under conditions similar to those existing in the Imperial Valley.

That is what counsel meant when he said "no foundation has been laid". The evidence would not be competent unless conditions were similar, and the court could almost take judicial notice that they were not.

Furthermore, it is within the discretion of the trial court as to how far he will go in permitting the introduction of cumulative evidence. If the ruling was right on any ground it should stand. The court did allow, on behalf of defendant, five depositions on the point as to how the milker worked under similar conditions.

2. The San Leandro case is similar, except that the objection specifically stated (Tr. p. 215) that the offer "does not include any offer to show that the conditions under which this machine was

operated were similar or identical with those under which the machine of the plaintiff was operated".

The objection stated the fact as appears from the record; it was sustained and an exception noted. There was no offer, or attempt, to show that the conditions were the same.

The testimony offered was therefore incompetent, and the ruling proper.

XI.

THE COURT PROPERLY EXCLUDED EVIDENCE OF THE EXCLUSION OF IMPERIAL VALLEY DAIRY PRODUCTS FROM LOS ANGELES, DURING THE CROSS-EXAMINATION OF H. D. NYE, BY THE DEFENDANT.

This is not the proper method of proving Skinner's Dairy unsanitary. There is nothing to show who made the ruling, if one of exclusion was made; nothing to show that Skinner was affected by or bound by it, or that the boycott, if one existed, was based on the condition of Skinner's Dairy.

If the witness had testified that all the dairies in the Imperial Valley were sanitary, the question might be proper cross-examination to test his knowledge, but he testified on direct examination only as to Skinner's Dairy.

This evidence is no more admissible to prove Skinner's Dairy was unsanitary than evidence that all alien enemies were excluded from the water-front of San Francisco for fear of arson would be admissible to prove a particular alien enemy guilty of arson. To state the proposition is to see the fallacy of it.

The question of whether or not Skinner's Dairy was in fact sanitary is susceptible of proof by direct evidence, and there was no need, even though the rules of evidence should allow such evidence as was attempted to be introduced, of getting at it in such a manner. To permit the introduction of such evidence would open up a multitude of questions which would only confuse the jury. Was Los Angeles right in its boycott? Was Skinner's Dairy considered? If not, shouldn't it have been excepted? And finally, this defendant is not to be judged here on the basis of a boycott placed on the milk of a whole community, or even on what Los Angeles may have thought of his dairy.

At page 271 of the brief for plaintiff in error, counsel say:

> "No new ground of objection can now be imported into this situation, and the rulings of the learned judge below must, we submit, stand or fall upon the record as made and presented."

It is needless to say that this is not the rule.

> "The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case, the party against whom the ruling was made cannot urge that the objection was too general."
>
> Jones on Evidence, second edition, par. 894, p. 1147;
>
> Hurlbut v. Hall, 39 Neb. 889;
>
> Mine & Smelter Supply Co. v. Parker Lacy Co., 107 Fed. 881.

"The court is not bound to receive irrelevant evidence, even though both parties consent."

Jones on Evidence, second edition, par. 172;

Farmer's Bank v. Winfield, 20 Wend. 421.

XII.

THE HYPOTHETICAL QUESTION ADDRESSED TO DR. HART WAS PROPER UNDER THE EVIDENCE.

The question fairly states the testimony which is correct on the plaintiff's theory of the case, and is therefore proper.

Union Pac. Ry. v. McMican, 194 Fed. 396.

Taking up the objections made by counsel for plaintiff in error we find that they are not real.

1. The question as to "garget" is explained by Mr. Skinner, at pages 150 and 151 of the Transcript. On page 150 he says he understands by "garget" "when a cow comes in fresh * * *, very often her bag will be swelled and puffed out until the milk gets out." "I had had cows that had garget, as I understand it, before I used the milking machine. I had had a few cows that were extra heavy milkers, that their quarters would be puffed, not swollen." And at page 151: "I never had any injury to cows' teats; I never had any trouble like that; I never had any cows step on it before." It is apparent that Mr. Skinner applied the term "garget" to an udder puffed by an over supply of milk and swollen on that account.

Dr. Hart, however, defines "garget" as "caked udder" (Tr. p. 190). It is to be presumed that "garget" was used in the question, in the sense it was used by Dr. Hart, the expert. According to Skinner's testimony there had been no case of "caked udder" in his herd.

2. The contention that Reed was not an "expert operator" ill-becomes the plaintiff in error.

Frederick A. Frank, the sales manager of defendant company at San Francisco, testifying on behalf of the company at page 253, Tr., says:

> "I know Albert John Reed. He was with the Sharples Separator Company as a *milking machine expert* for a period of about nine months. * * * Mr. Reed was engaged to install milking machines and to instruct purchasers of the same in their proper use. He worked under the direction of the San Francisco office."

The company sent him to Skinner as an expert, and is estopped to deny his qualifications.

3. There is evidence that the "machine was cared for." The parts in question were the teat cups and they were kept in lime water to sterilize them, according to instructions (Tr. p. 149). The machine had "gotten dirty" before it was started again in October (Tr. p. 129) because it had not been used since July. But it was cleaned before it was started up in October (Tr. 129, bottom of page).

4. The evidence justifies the statement in the question that the machine "was cared for and

operated in accordance with instructions furnished by the defendant company." (Tr. p. 148, bottom of page.) Reed's instructions were also instructions of the company, (Tr. p. 253) for the sales manager of the company there says Reed was employed "to instruct purchasers of the same in their proper use".

5. The other objections to the hypothetical question are as ill-founded as the ones we have answered particularly, and it is a waste of time to treat them individually.

The alleged errors of omission covered at pages 296-7 of the brief of plaintiff in error are all answered by the statement in the question that the machine was operated according to instructions.

6. The point that an opinion was not founded on all the facts of the case "goes to the weight of his evidence rather than to its competency and materiality".

> Reardon v. Richmond Land Co., 21 Cal. App. 357 at 359; 131 Pac. 894.

This honorable court, in the case of Swensen v. Bender, 114 Fed. 1, at page 6, upon a similar objection to a hypothetical question, said:

> "The objection to this question was that 'It was based upon facts not in evidence, and upon a hypothetical nervous condition subsequent to the accident, of which there was no evidence.' This objection was properly overruled. There was testimony offered upon every fact specified in the question. It is always proper to permit such questions to be answered,

> and it is not, as a general rule, necessary that the questions should embrace or cover all the facts of the case. The authorities upon this point will be found in Railroad Co. v. Roller 41 C. C. A. 22; 100 Fed. 738, 754; 49 L. R. A. 77."

Furthermore as appears (Tr. 207) the witness evaded a direct answer to the question, so defendant was not prejudiced, even though it should be held that the question was not in proper form.

XIII.

THE COURT DID NOT ERR IN PERMITTING MR. SKINNER TO TESTIFY AS TO THE AMOUNT OF HIS LOSS IN BUTTER FAT AND RESOLVE IT INTO DOLLARS AND CENTS.

There is a distinction between "loss" of butter fat and "damage" suffered. Skinner did not testify as to what his damage was.

At page 138 of the Transcript Skinner gives the basis of his estimate and the jury has all the facts. It does not harm the defendant for Skinner to make the computation and state his loss of butter fat in dollars and cents.

XIV.

THE INSTRUCTIONS TO THE JURY WERE FULL, FAIR AND PROPER.

The first assignment is a fair sample of the rest, and falls of its own weight. Counsel cannot seri-

ously urge that the statement of the trial court to the jury, of what the case is about constitutes an assumption on the part of the judge that losses were actually suffered. The judge below simply characterized the nature of the action, as the court in the trial of a defendant for murder might well say, and without harm or error: "This is an indictment for murder." Would counsel say that he thereby told the jury that he believed murder had been committed? No one seeking the truth would make such a claim. A further reply to such objections would be an imposition on this honorable court.

CONCLUSION.

For the foregoing reasons we submit that the evidence fully supports the verdict and judgment; that no reversible error appears in the rulings of the trial judge and that the judgment should be affirmed.

Dated, San Francisco,
March 2, 1918.

Respectfully submitted,

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